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IN THE

Supreme Court of the United States

October Term, 1955
No. 885

BERNARD P. CALHOUN,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO, and HONORABLE JOHN A. HEWICKER, Judge of said Court,

Appellees.

Appeal From the Supreme Court of California.

STATEMENT AS TO JURISDICTION.

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Appeal From the Supreme Court of California.

STATEMENT AS TO JURISDICTION.

Appellant Bernard P. Calhoun submits herewith his statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the order of the Supreme Court of California in Cause No. L. A. 23779 denying appellant's Petition for Writ of Prohibition.

The Opinion Below.

The opinion of the Supreme Court of California and the dissenting opinions of Mr. Justice Carter and Mr. Justice Schauer of said Court are reported in 46 Advance California Reports No. 1 (Jan. 17, 1956), page 16, *et seq.* Copies of the majority and dissenting opinions are attached hereto as Appendix A.

Jurisdiction.

1. This is an appeal from a decision of the Supreme Court of California denying appellant's petition for writ of prohibition. In such petition appellant sought to have the Superior Court of San Diego County, California, and the Honorable John A. Hewicker, Judge thereof, prohibited and restrained from proceeding further against appellant in *People v. William G. Boncelli, Bernard P. Calhoun, et seq.*, No. 195342, in said Superior Court.

2. The Supreme Court of California handed down its opinion on December 30, 1955, and the order of said court discharging the alternative writ of prohibition and denying the peremptory writ was entered by the Clerk of said Court on that date. Appellant's petition for rehearing was denied on January 25, 1956. Notice of appeal to this Court was filed by appellant with the Clerk of the Supreme Court of California on January 27, 1956, and an amended notice of appeal to this court was filed by appellant with said Clerk on February 8, 1956.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A., Section 1257(2). Appellant challenges the validity of Subdivision 5 of Section 182 of the Penal Code of California and Section 5002.5 of the Elections Code of California on the ground that said statutes are repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of the highest court of the state was in favor of the validity of said statutes.

4. Cases believed to sustain the jurisdiction of this Court on appeal include:

Madruga v. Superior Court, 346 U. S. 556, 98 L. Ed. 290, 74 S. Ct. 298;

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61.

5. Said invalid state statutes read as follows:

(a) Section 182 of the Penal Code of California provides:

"If two or more persons conspire:

* * * * * * * *

"5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

* * *"

(b) Section 5002.5 of the Elections Code of California provides:

"Any elective State officer who is authorized by law to issue licenses, or who is a member of any board or agency authorized to issue licenses, or any person seeking election to such office, board or agency, or any appointee or employee of such office, board or agency, who directly or indirectly solicits, receives or agrees to receive any money or other thing of value, or any promise thereof, from any licensee named in, or any holder of, any license issued by such officer, board or agency, or from any agent of such licensee or license holder, for any political campaign of any person seeking election or reelection to the office, board or agency authorized to issue such license, is guilty of a misdemeanor."

Questions Presented.

1. Whether Subdivision 5 of Section 182 of the California Penal Code is invalid, because it is repugnant to the Fourteenth Amendment to the Constitution of the United States in that said statute is so vague and indefinite that it fails adequately to define the offense or to give reasonable standards for determining guilt.

2. Whether Section 5002.5 of the California Elections Code is repugnant to the Fourteenth Amendment to the Constitution of the United States, in that it is legislation based upon an arbitrary classification of the persons included within its scope, is not of uniform operation, and is void for vagueness and uncertainty.

3. Whether, if it be assumed that Section 5002.5 of the California Elections Code is constitutionally valid, nevertheless the indictment is based upon an intentional and wilful discrimination against appellant and, therefore, is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the indictment in said criminal action, and each count thereof, is void for vagueness and uncertainty and for failure to define an offense, under the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case.

Appellant is an attorney at law, duly licensed to practice law in all of the courts of the State of California. At all times involved herein he was attorney for the Southern California Spirits Foundation, an association composed of wholesale liquor distributors.

On February 9, 1955, the grand jury of San Diego County, California, returned an indictment against Wil-

liam G. Bonelli, Bernard P. Calhoun (appellant herein), and ten unnamed John Does, charging:

(a) In Count One of the indictment that the defendants, in violation of Subdivision 1 of Section 182 of the California Penal Code, conspired to violate Section 5002.5 of the California Elections Code.

(b) In Count Two of the indictment that the defendants committed the crime of Conspiracy to do acts Injurious to Public Morals and to Pervert and Obstruct Justice and Due Administration of the Laws (Penal Code, Sec. 182, Subd. 5), in that they conspired "to use the said William G. Bonelli's official position of membership of the Board of Equalization, of the State of California, for the private gain of said co-conspirators in that said defendants and their co-conspirators did agree among themselves that they would unlawfully collect funds from licensees and applicants for licenses of the Board of Equalization for the private gain of William G. Bonelli and John Does one through ten inclusive, whose true names are to the Grand Jury unknown; and for the private gain of all said defendants and co-conspirators; * * *"

(c) In Count Three of the indictment that the defendants committed the crime of Conspiracy to do acts Injurious to Public Morals and to Pervert and Obstruct Justice in Due Administration of the Laws (Penal Code, Sec. 182, Subd. 5), in that they conspired "to prepare misleading, false and deceitful papers, records and instruments in writing, with the intent to allow the same to be produced for fraudulent and deceitful purposes upon trials, proceedings and inquiries authorized by law, for the purpose of perverting and obstructing justice and the due administration of the law; * * *"

A copy of the Indictment is attached hereto as Appendix B.

On March 25, 1955, in said Superior Court of San Diego County, appellant demurred to the indictment on the ground that the counts therein do not state an offense because such counts are too indefinite. On that same day said Superior Court made an order overruling the demurrer, and the order was regularly entered in the minutes of said Superior Court.

After the demurrer was overruled, appellant was required to plead to the indictment. He thereupon entered a plea of "not guilty" to each and every count of the indictment.

On April 6, 1955, appellant filed with the District Court of Appeal for the Fourth Appellate District of California, his Petition for Writ of Prohibition in which he sought to prohibit and restrain said Superior Court from taking any further proceedings against appellant on the charges in the indictment. The basis of the Petition for Writ of Prohibition was that the court had no jurisdiction to try appellant on the charges in the indictment because:

(1) Count One of the indictment is invalid because Section 5002.5 of the Elections Code is contrary to the Fourteenth Amendment to the United States Constitution and to Article I, Section 9 of the California Constitution; and

(2) Counts Two and Three of the indictment are invalid because Subdivision 5 of Section 182 of the Penal Code is contrary to the Fourteenth Amendment to the United States Constitution.

On April 14, 1955, the District Court of Appeal denied the Petition for Writ of Prohibition without a written opinion.

On May 23, 1955, appellant filed his petition for hearing in the Supreme Court of California. On June 9, 1955, the Supreme Court of California granted a hearing, and on June 14, 1955, it issued an alternative writ of prohibition restraining said Superior Court and the Honorable John A. Hewicker, Judge of said Superior Court, from taking any steps or proceedings, including trial, with regard to appellant in said criminal action until further order of the court.

On December 30, 1955, the Supreme Court of California discharged the Alternative Writ of Prohibition and denied the peremptory writ.

On January 25, 1956, the Supreme Court of California denied appellant's petition for rehearing.

The Federal Questions Are Substantial.

This appeal raises the substantial Federal question of whether Subdivision 5 of Section 182 of the Penal Code of California is repugnant to the Fourteenth Amendment to the United States Constitution, because it is so vague and indefinite that it fails adequately to define the offense or to give reasonable standards for determining guilt. This Court, in *Musser v. Utah*, 333 U. S. 95, 68 S. Ct. 397, 92 L. Ed. 562, indicated that a Utah Statute similar to said California statute is unconstitutional on that ground. In that case the constitutional question was raised for the first time by the justices of this Court and was not raised in the state court. The majority of this Court held that the case should be remanded to the Utah Supreme Court

for its construction on the Utah statute. Thereafter, the Utah Supreme Court, in *Musser v. Utah,* 118 Utah 537, 223 P. 2d 193, reversed the conviction on the ground that said Utah statute is contrary to the Fourteenth Amendment to the United States Constitution, because it is so vague and uncertain. Subdivision 5 of Section 182 of the California Penal Code is the statute involved in Counts Two and Three of said Indictment.

In sustaining the validity of Subdivision 5 of Section 182 of the Penal Code, the California Supreme Court decided an important Federal question in a way which conflicts with applicable decisions of this Court. (See *United States v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, 41 S. Ct. 298; *Musser v. Utah,* 333 U. S. 95, 68 S. Ct. 397, 92 L. Ed. 562; *Winters v. New York,* 333 U. S. 507, 92 L. Ed. 840, 68 S. Ct. 665; and *United States v. Cardiff,* 344 U. S. 174, 97 L. Ed. 200, 73 S. Ct. 189.)

The other substantial federal question presented in this appeal is whether Section 5002.5 of the Elections Code of California is contrary to the Fourteenth Amendment to the United States Constitution in that it is legislation based upon an arbitrary classification of the persons included within its scope, is not of uniform operation, and is void for vagueness and uncertainty. Section 5002.5 of the Elections Code is the statute involved in Count One of the indictment.

The California Supreme Court in the instant case held that both of said California criminal statutes are valid and are not contrary to the Fourteenth Amendment to the United States Constitution. In so holding it refused to issue the Writ of Prohibition sought by appellant. The result of the state court's decision is that, unless this

ourt determines said federal questions, appellant will ave to undergo a long and expensive trial. Nothwithanding his eventual acquittal, the trial will cause appellant to suffer embarrassment, degradation, irreparable amage to reputation, loss of valuable time, and substantial expense. Such damage is particularly harmful appellant because it will seriously impair his professional reputation as an attorney.

Conclusion.

Appellant respectfully suggests that this appeal brings efore this Court federal questions under the Constitution hat are so substantial as to require plenary consideration, ith briefs on the merits and oral argument, for their esolution.

Respectfully submitted,

JOHN W. PRESTON,

CHARLES H. CARR,

Counsel for Appellant.